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FinCEN Anti-Money Laundering Notice Falls Flat With Experts

By **Al Barbarino**

Law360 (July 1, 2021, 9:25 PM EDT) -- One day after the Financial Crimes Enforcement Network announced the "milestone" release of a first-of-its-kind set of anti-money laundering priorities, industry attorneys on Thursday lamented how little guidance the document actually provides to financial institutions, calling it unhelpful and disappointing.

FinCEN, the financial crimes bureau of the U.S. Treasury Department, rolled out the priorities as required under the Anti-Money Laundering Act of 2020, or AML Act, on Wednesday, outlining long-standing threats like corruption as well as the growing concerns of cybercrime.

The priorities are intended to help financial institutions "prioritize the use of their compliance resources," FinCEN said in Wednesday's announcement. While FinCEN said it won't hold firms to the priorities until it releases implementing regulations, the bureau urged companies to start preparing.

They "may wish to start considering how they will incorporate the AML/CFT Priorities into their risk-based AML programs," FinCEN said, referring both to anti-money laundering and countering the financing of terrorism.

The priorities highlight what could become key emerging regulatory focus areas, including those linked to corruption, domestic terrorism and digital assets, attorneys noted. But by and large, the eight-category, 12-page document offers little in the way of prescriptive approaches to actually tackle the issues, they said.

"It's disappointing," said Peter Hardy, the founder of Ballard Spahr LLP's anti-money laundering team and a former assistant U.S. attorney in Philadelphia. "There's not a whole lot of guidance here."

While Hardy said he thinks FinCEN acted with the "best of intentions," he said the list appears to be an AML crimes catchall, perhaps out of fear that drilling into any single illicit activity too deeply might have been taken to suggest that others were not as important.

Ross Delston, an independent attorney and expert witness, agreed. He called the document "distinctly unhelpful for banks and other financial institutions because the categories on the list are so broad as to be useless."

"Pointing all of this out to banks and other financial institutions is something required by the law, but unless it's followed by very specific recommended actions, it will not contribute in any significant way to bank compliance activities," Delston said.

Nikhil Gore, a Covington & Burling LLP partner whose work includes the representation of financial institutions on AML enforcement matters, also said the priorities seemed too broad for firms to take meaningful action.

"It may be hard for banks to use them to identify the pieces of their AML program that should receive focused resources and attention," Gore said.

But he noted that FinCEN was under a tight deadline, as the bureau was required to furnish the priorities within 180 days of the AML Act's Jan. 1 enactment. He also said that, despite the broad strokes, there were still some notable takeaways in the priorities that companies may want to start taking a closer look at.

Though FinCEN said the priorities were not grouped in any particular order, corruption appeared first on the list, and the bureau cited a corruption-focused memo issued last month by President Joe Biden.

"One takeaway for financial institutions is to assess their exposure to corruption risk across a range of businesses, whether that be private banking [or] investment banking transactions for state entities," Gore said.

Gore also pointed to the section on virtual currency, nestled along with cybercrime and cybersecurity, as particularly topical. Regulators have grappled with the regulation of cryptocurrency as it's been thrust into the mainstream, embraced even by financial giants like PayPal and Goldman Sachs.

"Banks are facing a lot of demand for virtual currency services," Gore said.

"It's a question of having the right process and governance around new product approval processes," he added. "I think one thing that regulators will look for is what kind of governance and process documentation you have around the new product offering to demonstrate that you took a thoughtful approach."

Sections on domestic terrorism also stood out, given the increased scrutiny since the attack on the U.S. Capitol building Jan. 6.

On his first full day in office, Biden directed his national security team to lead a review of government efforts to address domestic terrorism. The following month, it was the topic of discussion during a U.S. House Financial Services Committee hearing.

"This is another reminder that countering the financing of terrorism no longer means targeting foreign-based terrorists, but to an almost equal extent you should [be aware of] domestic terrorists," Gore said.

But again, attorneys noted the priorities didn't begin to explain how banks and other financial institutions should address this growing threat. The priorities point to ethnically motivated violent extremists — "primarily those advocating for the superiority of the white race" — and anti-government or anti-authority violent extremists as the "most lethal domestic violent extremist threats."

Delston said it would be exceptionally difficult for banks to detect such entities or individuals, and that it's "not clear that FinCEN will be able to provide any real guidance as to how banks can go about detecting violent domestic terrorism."

Financial institutions have typically relied on government-issued blacklists, such as the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List, to screen for potential illicit activity originating abroad, he noted, but no such domestic terror list exists.

"These are not the types of risks that banks are well-situated to detect, and it's not at all clear how they would be able to effectively accomplish this without having a name on a list," he said. "Add to that the fact that many people use apps like Venmo to move small amounts of money ... which is very hard to monitor."

FinCEN has 180 days from Wednesday's release of the priorities to craft implementing rules, and the bureau said it plans to put forth a proposal for those rules in the "coming months."

Gore said "the hope is" that the rules will carry more specificity as to how firms can begin to better target their resources to focus on the top priorities. This, after all, was the key directive within the AML Act.

According to the act, financial institutions will be required to review and incorporate the priorities into their AML programs, which will be a measure "on which a financial institution is supervised and examined."

As for whether the coming rules will offer more specific guidance to firms, Hardy of Ballard Spahr remained skeptical.

"Not really," he said. "Perhaps they'll put some more meat on the bone. But I fear and suspect that the regulations are going to be more of the same."

Delston said he anticipates the coming regulations may add language stating that institutions should "take into account" the priorities, but he too wasn't very optimistic they will be particularly detailed.

"The regulations are supposed to provide a very clear prescription as to how financial institutions should approach these types of risks," he said. "But my best guess is that it's going to turn out to be very general."

The U.S. Treasury Department's press office did not immediately respond to requests for comment.

--Editing by Marygrace Murphy and Jill Coffey.
